

REMARKS

In the Office Action mailed February 13, 2009 (“Office Action”) claims 19-22, 24-27, and 29 were rejected on the grounds of obviousness type double patenting, but otherwise indicated as allowed. The Applicants thank the Examiner for the indication of allowed claims. In order to advance prosecution, claims 5-14 and 28 are cancelled through this amendment without prejudice to further pursue the cancelled subject matter in a continuing application. Claims 19, 22, and 29 are amended to correct typographical errors. No new matter has been added. Accordingly, only allowed claims 19-22, 24-27, and 29 are currently pending and Applicants respectfully request a prompt Notice of Allowance.

Applicants also thank the Examiner for the telephone interview on April 13, 2009. During the Interview the Applicants discussed the amendments to claims 22 and 29 (in order to correct typographical errors) and the Examiner agreed to enter the amendments.

Double Patenting

A non-statutory obviousness type double patenting rejection, based on various claims of US Patent 7,207,949 to Miles et al., was maintained because the Applicants inadvertently used the wrong patent number (i.e. 7,207,409) when filing a terminal disclaimer in response to the same rejection raised in a previous office action. In response, a corrected terminal disclaimer to US Patent 7,207,949 is submitted herewith, such that the double patenting rejection should be withdrawn. MPEP § 1490(V)(c) (stating that, when a corrective Terminal Disclaimer is submitted, the second Terminal Disclaimer replaces the first Terminal Disclaimer, and the first Terminal Disclaimer is thus void”).

The Applicants note that filing of a Terminal Disclaimer simply serves the statutory function of removing the rejection of double patenting, and is “not an admission of the propriety of the rejection.” MPEP § 804.02. Furthermore, the Applicants note that US Patent 7,207,409 is not commonly owned with the present application. As such, the terminal disclaimer to US Patent 7,207,409 (previously filed in error) is improper and void.

Conclusion

The foregoing amendment has been submitted to place the present application in

condition for allowance and a prompt Notice of Allowance is respectfully requested. It is believed that all of the pending claims have been addressed. However, the absence of a reply to a specific rejection, issue or comment does not signify agreement with or concession of that rejection, issue or comment. In addition, because the arguments made above may not be exhaustive, there may be reasons for patentability of any or all pending claims (or other claims) that have not been expressed. Nothing in this paper should be construed as an intent to concede any issue with regard to any claim, except as specifically stated in this paper, and the amendment of any claim does not necessarily signify concession of unpatentability of the claim prior to its amendment. Applicants hereby expressly reserve the right to further prosecute the subject matter of claims 5-14 and 28 (prior to cancellation), for example, in a continuing application. Furthermore, Applicants wish to make the Examiner aware of the following co-pending applications, so as to facilitate the Examiner's analysis.:

Application Number	Filing Date	Attorney Docket Number
10/444,917	05/22/2003	016US1
10/789,787	02/27/2004	014US1
10/682,568	10/08/2003	029US1
10/759,811	01/16/2004	039US1
11/789,284	04/23/2007	095US2

It is believed that the Examiner has full on-screen access to each of the Office Actions and other materials in each of the aforementioned cases via the Patent Office's PALM system. Further, it is believed that the references presently cited in the Office Actions of the aforementioned cases are already included in the record of this case. Courtesy copies of such Office Actions or any other materials from the aforementioned cases can be provided upon request.

The Applicant hereby authorizes a payment of the \$70.00 fee for the filing of a terminal disclaimer, to be charged to Deposit Account No.: 50-2040 for Customer No.: 30,328. No other fees are deemed necessary at this time. However, in the event that there are any additional fees to be charged or payments to be credited, the Applicant hereby requests that any charges or credits be made to Deposit Account No.: 50-2040 for Customer No.: 30,328. In the event that there are any questions concerning this Amendment or the application in general, the Examiner is cordially invited to telephone the undersigned attorney so that prosecution may be expedited.

Respectfully submitted,
NUVASIVE, INC.

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